Robert W. Quinn, Jr.
Director - Federal Government Affairs

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December 9, 1997

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M street, NW, Room 222
Washington, D.C. 20554

RE: Ex Parte
CC Dkt. No. 97-231 Applications by BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provisioning of In-Region, interLATA Service in Louisiana.

Dear Ms. Roman Salas:

On Monday December 8, 1997, I provided, at the request of Linda Kinney of the Commission Staff, a copy of the document titled Comments of BellSouth Telecommunications, Inc. on Eighth Circuit Opinion filed by BellSouth before the Louisiana Public Service Commission on October 29, 1997 in Docket No. U-20883.

Two copies of this Notice are being submitted on the following business day to the secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Robert W. Quinn, Jr.

Attachments

cc: L. Kinney

021

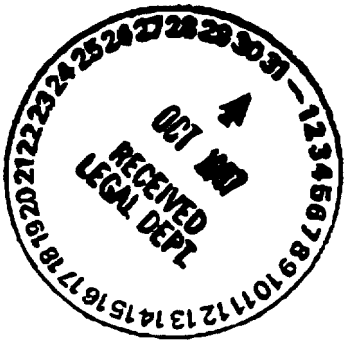
cc: Debra Winegard
LaRocca--

BELLSOUTH

BellSouth Telecommunications, Inc. 504 528-2050
Room 1870
365 Canal Street
New Orleans, Louisiana 70130-1102

Victoria K. McHenry
General Counsel – LA

October 29, 1997



BY HAND

Ms. Susan Cowart
Louisiana Public Service
Commission
P. O. Box 91154
Baton Rouge, LA 70821

RE: LPSC Docket No. U-20883
BellSouth Telecommunications, Inc.
Local Competition Rules and Regulations

Dear Ms. Cowart:

Enclosed are the original and one (1) copy of the Comments of BellSouth Telecommunications, Inc. on Eighth Circuit Opinion in *Iowa Utilities Board* which we request that you file into the record of the referenced docket. Additionally, please date stamp the extra copy for our files.

With kind regards, I am

Sincerely,

Victoria K. McHenry

VKM/as
Enc.

cc: Official Service List (w/enc)(By Hand or U.S. Mail)

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

In re: The Development of Rules and Regulations Applicable to the Entry and Operations of, and the Providing of Services by, Competitive and Alternative Access Providers in the Local, Intrastate and/or Interexchange Telecommunications Market in Louisiana	*	Docket No. U-20883

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC. ON EIGHTH CIRCUIT OPINION IN *IOWA UTILITIES BOARD*

On September 16, 1997, the Louisiana Public Service Commission (the "Commission") issued a Notice of Proposed Rulemaking seeking comments from interested parties concerning any proposed amendments to the Commission's Regulations for Competition in the Local Telecommunications Market ("Louisiana Regulations") that may be necessary as the result of the July 18, 1997 Eighth Circuit Court of Appeals decision in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). Similarly, in Order No. U-22252-A dated September 5, 1997, the Commission ordered interested parties to file comments addressing the impact of the Eighth Circuit's decision on the Statement of Generally Available Terms and Conditions ("SGAT") approved by the Commission, subject to certain modifications. BellSouth and other parties submitted comments in response to Order No. U-22252-A on September 15, 19997. In addition to the comments submitted in that docket, BellSouth submits the following updated comments.

1) **Vertical features.**

One of the issues in the AT&T arbitration (Docket No. 22145) was the price AT&T must pay for BellSouth's vertical services, such as Caller I.D. and Call Waiting. In Orders No. 22145 (dated January 26, 1997) and 22145-A (dated June 12, 1997), this Commission concluded that the price of unbundled local switching did not include the features, functions and capabilities used to provide vertical services, such as Caller ID, Call Waiting, and Call Return, when those features, functions and capabilities are used by AT&T to offer services identical to BellSouth's retail services. In such circumstances, the Commission ruled that these features are retail services that are available to AT&T at the wholesale resale discount. Section 1001.A of the Louisiana Regulations was amended to incorporate this legal and policy decision in March of 1997. BellSouth's original SGAT, filed in May of 1997, also reflected this Commission ruling by stating in the Price List at Attachment A that vertical features were available at the wholesale resale discount for vertical services. Because such features were considered retail services available for resale, rather than unbundled network elements, BellSouth's Price List did not include a specific unbundled rates for vertical features.

Petitioners before the Eighth Circuit argued that the FCC rules that required ILECs to provide competitors with unbundled access to vertical features unduly expanded the ILEC's unbundling obligation beyond the statutory requirement. The Eighth Circuit held that vertical switching features "qualify as network elements that are subject to the unbundling requirements of the Act." 120 F.3d at 808.

In Order No. U-22252-A, dated September 5, 1997, the Commission approved BellSouth's SGAT, subject to modification "to delete the language in the BellSouth Price List in

Attachment A to the Statement that the price of unbundled local switching does not include retail services, and that retail services are available at wholesale rates and substitute the following language: 'Vertical switching features such as call I.D., call forwarding and call waiting are network elements that are subject to unbundling requirements of the Act.'" BellSouth's revised SGAT filed on September 9, 1997 incorporates this modification, which is consistent with the Eighth Circuit ruling.

Recently, on October 23, 1997, the Commission issued Order No. 22022/22093-A, which established permanent, cost-based rates for interconnection and unbundled network elements, including all vertical features offered by BellSouth.

Proposed Action: In order to bring the Louisiana Regulations into line with the Eighth Circuit opinion and this Commission's Order No. U-22252-A, this Commission should amend the Louisiana Regulations as follows:

[Revise Section 901.C.1 as follows:]

1. Physical interconnect charges between and among TSPs shall be tariffed and based on cost information. ILECS shall provide interconnection and unbundled network elements at the permanent, cost-based rates established by the Commission in Order No. 22022/22093-A dated October 23, 1997. ~~The cost information derived from both TSLRIc and LRIC studies shall be provided to the Commission. This information will be used by the Commission to determine a reasonable tariffed rate. There is no mandate that interconnection services be provided by the ILEC to TSPs at its TSLRIC or LRIC of providing such services. As an interim measure, until such cost studies are completed and a decision rendered thereon by the Commission in Docket No. 22022, consolidated with Docket No. U-22093, or other pertinent Commission proceeding, interim rates for unbundled network elements are hereby established as listed on attached Appendix "D." At such time as a final order issues in Docket No. U-22022, consolidated with U-22093, rates will be re-calibrated accordingly.~~

[Delete Section 1001.A except for first sentence and replace with language appearing in next section of Comments]

2) **Recombinations of UNEs.**

A major issue in the AT&T arbitration was the appropriate pricing for recombinations of unbundled network elements used by CLECs to provide finished telecommunications services identical to the ILEC's retail services. BellSouth did not argue in the arbitration that CLECs could not combine network elements in any manner they wanted, including to provide finished telecommunications services; rather, BellSouth contended that, when CLECs recombined ILEC UNEs to create a service identical to the ILEC's retail service, then the CLEC should be required to pay the wholesale retail price for the service and not the combined UNE price of the elements. In Order No. 22145, dated January 26, 1997, the Commission ruled that "AT&T may combine unbundled elements in any manner they choose; however, when AT&T recombines unbundled network elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount ... and offered under the same terms and conditions as BellSouth offers the service under." *See* Order No. 22145 at pp. 39-40. This policy and legal conclusion was incorporated into Section 1001.A of the Louisiana Regulations in the amendments adopted on March 19. 1997, and also was included in BellSouth's original SGAT filed in May of 1997.

Before the Eighth Circuit, petitioners opposed the FCC rules on unbundling, arguing among other things, that CLECs should not be allowed to rely entirely on recombined network elements to provide finished telephone service, but rather should be required to provide some facilities of their own to provide such service. The FCC (and the IXCs) argued that the FCC rules should stand in their entirety, including the rules requiring ILECs to combine network elements on behalf of CLECs.

The Eighth Circuit first rejected unequivocally the FCC rules that required ILECs to recombine network elements purchased by requesting carriers. *Iowa Utilities Board v. FCC*, 120 F.3d at 813. The Court reasoned as follows:

> We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements.
>
> . . . .
>
> Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work.

Id.

In the next section of its July 29th opinion, the Court rejected petitioners' argument that CLECs should not be permitted to provide finished telecommunications services solely through reliance on unbundled network elements purchased from the ILEC. *Id.* at 813-14. Petitioners had argued that permitting CLECs to provide finished telecommunications services without investing in any facilities of their own would defeat the purpose of the Act and subvert the resale provisions of the Act. In rejecting these arguments, the Court carefully distinguished the provision of service using unbundled network elements from the provision of service using resale, relying in large part on its holding that CLECs themselves are required to assume the risk and make the investment necessary to combine unbundled network elements purchased from the ILEC. The Court reasoned as follows:

> We do not believe that this interpretation of subsection 251(c)(3) will cause all requesting carriers to select unbundled access over resale as their preferred route to enter the local telecommunications market. Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative . . . . [O]ur decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option. With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements.
>
> Given the disadvantages of completely relying on unbundled access as a means to provide local telecommunications services, we believe that many new entrant carriers will choose to resell such services under subsection 251(c)(4). Consequently, we do not believe that incumbent LECs will lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations. The increased risk and the additional cost of recombining the unbundled element will hinder the ability of competing carriers to undercut these prices and lure these customers away from the incumbent LECs.

Id.

Following the Eighth Circuit ruling, this Commission issued Order No. U-22252-A dated September 5, 1997. In that Order, the LPSC approved BellSouth's SGAT, subject to deletion of the language concerning combination of network elements and inclusion of the following language: "A requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications service. Requesting carriers will combine the unbundled elements themselves." BellSouth's revised SGAT filed on September 9th includes this language, which is fully consistent with the Eighth Circuit opinion.

Notwithstanding the clear language of the Eighth Circuit opinion, both AT&T and MCI argue in Comments filed on September 15, 1997 in Docket No. 22252 that they are entitled to

purchase and receive from the ILECs "bundled" as opposed to "unbundled" network elements. They contend that the absolute duty imposed by the Court on CLECs to combine themselves the unbundled network elements purchased from the ILEC applies only to "new combinations of network elements that do not exist within today's network." *See* AT&T's Comments on the Eighth Circuit's Decision, at p. 2 (emphasis in original). Whatever the term "new combinations" of network elements is supposed to mean (and that is far from clear), the term appears nowhere in the portion of the Eighth Circuit opinion discussing this issue. The Court's holding that CLECs must combine unbundled network elements purchased from ILECs is not, as AT&T intimates, limited or conditioned in any way. AT&T and MCI's arguments are flatly inconsistent with the Eighth Circuit's language quoted above. Requiring an ILEC to provide its entire current local exchange network already assembled and combined into a fully functioning platform for providing finished telephone service is plainly not providing elements "on an unbundled basis." 47 U.S.C. 251(c)(3).

The sole basis for the AT&T and MCI argument is the fact that the Eighth Circuit did not vacate Section 51.315(b) of the FCC rules, in addition to vacating Section 51.315(c)-(d). Section 51.315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The Eighth Circuit does not discuss this rule anywhere in its July 29th opinion, and the AT&T and MCI's interpretation of Section 51.315(b) as requiring BellSouth to provide "unbundled" network elements as a pre-assembled platform for providing finished telephone service is flatly inconsistent with the language of the Eighth Circuit's decision.

On August 19, 1997, BellSouth Corporation, GTE Entities, SBC Communication, Inc., and U.S. West, Inc. filed a joint petition asking the Court, in part, to clarify the correct interpretation of Section 51.315(b). On October 14, 1997, the Court granted the petitions for rehearing of BellSouth and other local exchange companies. The Court specifically vacated FCC Rule 51.315(b) (along with Rules 51.315(c)-(f)), finding that Rule 51.315(b) was contrary to Section 251(c)(3) of the Act. It reasoned as follows:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis.

See Iowa Utilities Board, et al. v. Federal Communications Commission, No. 96-3321, http://ls.wustl.edu/8th.cir/FCC/Opinions/963321.036, at p. 2 (October 14, 1997)(on rehearing).

Proposed Action: BellSouth proposes that the Commission revise Section 1001.D of its rules to make it consistent with Order No. U-22252-A. Additionally, BellSouth proposes new language to make clear its willingness to provide services that may be desired by CLECs to assist them in combining unbundled network elements themselves. Finally, clarifying language regarding software modifications involved with the ordering of CLEC-combined unbundled network elements is also proposed.

[Delete Section 1001.A except for first sentence]

[Add following language:]

> A requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications service. Requesting carriers will combine the unbundled elements themselves. CLECs may combine network elements in any manner to provide telecommunications services. ILECs will physically deliver unbundled network elements where reasonably possible, e.g., unbundled loops to CLEC collocation spaces, as part of the network element offering at no additional charge. Additional services desired by CLECs to assist in their combining or operating ILEC unbundled network elements are available as negotiated. Software modifications, e.g., switch translations, necessary for the proper functioning of CLEC-combined ILEC unbundled network elements are provided as part of the network element offering at no additional charge. Additional software modifications requested by CLECs for new features or services may be obtained through bona fide request.

3. AT&T Argument with Respect to CSAs and Promotions. In Comments filed in Docket No. 22252, AT&T asserted that the Eighth's Circuit's opinion invalidates this Commission's rulings with respect to resale of CSAs and promotions. No other party has raised this issue and AT&T's argument on this point is a classic "red herring". The Eighth Circuit's decision upholding the FCC's rules on restrictions on resale changes absolutely nothing. The opinion merely upheld the status quo. The FCC rules regarding restrictions on resale had not previously been stayed by the Court, and thus were applied by this Commission in resolving the arbitrations and in amending the Louisiana Regulations. This Commission's rulings with respect to CSAs and promotions fully comport with the FCC's unstayed rules, as affirmed by the Eighth Circuit, and the comments of AT&T and MCI are nothing more than reargument already considered and rejected by the Commission.

As Order No. 22145 makes plain, in resolving the AT&T arbitration, this Commission took due note of those portions of the FCC's August 1996 Interconnection Order that had been

stayed by the Eighth Circuit pending its decision, and those portions which were not stayed. The Commission expressly noted that unstayed provisions of the Order were binding. *See* Order No. 22145, at p. 1. Those portions of the FCC's August 1996 Interconnection Order that were not stayed by the Eighth Circuit, including §51.613(a), were followed by this Commission in ruling on the issues in the AT&T arbitration. Section 51.613(a), which deals with "Restrictions on resale," provides as follows:

(a) Notwithstanding § 51.605(b) of this part, the following types of restrictions on resale may be imposed:

. . . .

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(A) such promotions involve rates that will be in effect for no more than 90 days;[1] and

(B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

BellSouth's position in the arbitration was that services such as CSAs and short term promotions are not services available for resale under the Act (it did not dispute that long term promotions were subject to the wholesale resale obligation under the FCC rules). AT&T advocated the position that CSAs and short term promotions are services that should be available for resale at the wholesale resale discount. This Commission determined, consistent with the FCC First Report and Order, that short term promotions would not be available for resale,

[1] The FCC's rationale for excluding short term promotions from the Act's wholesale resale obligation is set forth in ¶¶ 949-950.

although long term promotions would be available for resale at the wholesale discount. *See* Order No. U-22145 at pp. 4-5, & 58 and Order No. U-22145-A at p. 3. It further decided, consistent with its authority under the FCC rules, to impose "reasonable and nondiscriminatory" restrictions on resale -- i.e., that CSAs are available for resale at no additional discount. Both of these rulings, which were incorporated as amendments to the Louisiana Regulations, are reasonable and nondiscriminatory restrictions on resale that are expressly permitted by the FCC's First Report and Order. *See* Section §51.613(a) and ¶ 949. Plainly, the Eighth Circuit's endorsement of the very same rules that this Commission followed do not require this Commission to undo what it has done. For these reasons, BellSouth respectfully suggests that Section 1101.B of the Louisiana Regulations require no modification in light of the Eighth Circuit decision.

Respectfully submitted,

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Attorneys For BellSouth
Telecommunications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing pleading to be served on counsel for all parties to this proceeding, by hand or by U.S. mail, postage pre-paid, on this 29th day of October, 1997.